Supreme Court, U.S.
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NO. 93-1192

IN THE
SUPREME COURT OF UNITED STATES

October Term, 1993

CYNTHIA WALTERS, Individually and as parent and natural guardian of MICHAEL DANIELLE WALTERS, a minor
Petitioner

versus

CITY OF ALLENTOWN and JEANNE COSTELLO,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT ON PETITIONERS CLAIM FOR PENSIONS FUND BENEFITS WHERE RESPONDENT'S PENSION PLAN DEPRIVES PETITIONER'S MINOR OF HER RIGHT TO EQUAL PROTECTION OF LAW BY PROVIDING PENSION BENEFITS FOR LEGITIMATE CHILDREN AND AT THE SAME TIME DEPRIVES ILLEGITIMATE CHILDREN (SUCH AS PETITIONER'S MINOR) OF THEIR NATURAL PARENTS' PENSION BENEFITS SOLELY BECAUSE OF THEIR ILLEGITIMATE STATUS?

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No._____

IN THE
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Petitioner

versus

CITY OF ALLENTOWN and JEANNE COSTELLO,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals For The Third Circuit

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Cynthia Walters, prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered October 16, 1993 is unrecorded and appears at page 1a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania entered April 26, 1993 is unrecorded and appears at page 3a of the Appendix.

JURISDICTION

The final Order of the Court of Appeals for the Third Circuit is dated October 16, 1993 and this Petition for Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISION INVOLVED

The Federal Provision involved is the Fourteenth Amendment to the United States Constitution which is set forth in the Appendix at page 31a .

STATEMENT OF CASE

a. Procedural History

Petitioner filed this declaratory judgment action seeking declaration of Petitioner minor's right to benefits under Respondent, City's pension plan fund. The parties filed cross motions for summary judgment. On April 26, 1993, the United States District Court for the Eastern District of Pennsylvania entered an Order granting Respondent's Motion for Summary Judgment and denying Petitioner's Cross-Mioon for Summary Judgment. The Court of Appeals for the Third Circuit affirmed. Petitioner's timely appeal is now before this Honorable Court for disposition.

b. **Statement of Facts**

The undisputed facts relevant to the cross motions follow.

Petitioner, Cynthia Walters, is parent and natural guardian of Michael Danielle Walters, a minor child, born January 25, 1988. Respondent, Jeanne Costello, at all times herein relevant, was the lawful wife of Michael Daniel Costello, now deceased.

Respondent, City of Allentown, controlled and operated a Police Pension Board which provides pension benefits for members of Respondent, City, police department and their dependents. Michael Daniel Costello was a member of Respondent City police department eligible for pension plan benefits.

Michael Daniel Costello was the natural father of Petitioner's minor, Michael Danielle Walters. A true and correct copy of Petitioner's Paternity Agreement with Michael Daniel Costello dated October 18,

1988 is attached to Petitioner's Appendix at p. 28a. The Paternity Agreement indicates that Michael Daniel Costello provided, inter alia, financial support to Petitioner's minor. (Appendix, p. 28a).

On or about March 6, 1992, Michael Daniel Costello died from a work-related injury, i.e. heart attack. On or about July 17, 1992, Petitioner demanded benefits from Respondent City's Police Pension Board on behalf of Michael Daniel Costello's dependent child, who is Petitioner's minor, Michael Danielle Walters.

Respondent, City refused and continues to refuse to pay benefits to Petitioner's minor. Respondent, City's Police Pension Ordinance was established and designed to provide for pension benefits for dependent children under age 18 after the death of the dependent's parent.

Despite Petitioner minor's entitlement to pension benefits as the dependent child

of Michael Daniel Costello, Respondent City refuses to pay Petitioner's minor benefits due. To the extent Respondent intentionally continues to refuse to provide pension benefits to the dependent child of Michael Daniel Costello based upon the fact that this child is illegitimate. Petitioner contends that Respondent's intentional refusal, violates Petitioner minor's right to equal protection of law guaranteed by the Fourteenth Amendment to the United States Constitution and Pennsylvania Constitution.

Upon these facts, the Court of Appeals affirmed the District Court's grant of Respondent's Motion for Summary Judgment. Petitioner respectfully seeks review by this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal Court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

I. Disputed facts preclude summary judgment. Federal Rule of Civil Procedure 56(c) states that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Small v. Seldows Stationary, 617 F.2d 922 (3d Cir, 1980). The court does not decide issues of fact, but simply determines if there is an issue of fact to be tried.

Ettinger v. Johnson, 556 F.2d 692 (3d Cir, 1977). The facts must be viewed in the light most favorable to the opposing party, and any reasonable doubt as to the existence of genuine issues of fact is to be resolved against the moving parties. Continental Insurance Company v. Bodre, 692 F.2d 436 (3d Cir, 1982).

Applying this standard to the case at bar, Respondents' motion ought to have been denied.

Petitioner filed a cross motion for summary judgment. The facts and arguments below support Petitioner's motion and refute Respondent's motion.

On July 17, 1992, Petitioner's attorney wrote and requested benefits from Respondent City for the illegitimate minor daughter of decedent. Complaint, Paragraphs 13-14.

Respondent City's attorney wrote and stated that Respondent City's pension plan

did not discriminate because all children were treated the same.

The above investigation was complete but fruitless. Respondent City contends that the ordinance allows Respondent to exclude Petitioner's minor from benefits. Petitioner contends Respondent City's proposed application of the ordinance violates Petitioner's minor's right to equal protection of laws. This legal argument was the only issue before the District Court making this matter ripe for summary judgment.

Contrary to Respondent's assertion, Respondent is not entitled to judgment as a matter of law. Petitioner is. Respondents' reliance upon the fact that Respondents never admitted or advised Petitioner that Petitioner's minor was being denied because of the child's illegitimate status (e.g., Respondent's District Court Brief, p. 2 and 3), is not fatal to Petitioner's

case. For the reasons below, Respondent, City, has violated Petitioner's equal protection rights.

The decedent was the natural father of Petitioner's minor. Petitioner entered a Paternity Agreement with the decedent regarding, inter alia, financial and support maintenance of this minor. (Appendix, p. 28a). The decedent regularly and faithfully paid Petitioner biweekly for support of this minor as agreed. (Appendix, p. 28a).

Respondent argues that upon the natural father's death, Respondent City effectively may terminate the natural father's support of Petitioner's illegitimate minor while maintaining support of decedent's "legitimate" children. Respondents' arguments violate Petitioner's minor's right to equal protection.

II. In equal protection analysis, illegitimacy as a classification is consid-

ered quasi-suspect status requiring a substantial relationship to a legitimate state interest to be sustained. Clark v. Jeter, 108 S.Ct. 1910 (1988) and cases cited therein.

A. Respondent's ordinance establishes a scheme where illegitimate children are afforded inferior rights based upon their classification as illegitimate.

1. Respondent, City's police pension fund ordinance states in pertinent part:

> 143.20 BENEFITS FOR SURVIVING SPOUSE OR DEPENDENT CHILDREN
>
> "A. Death in the Line of Duty
> If any police officer while in the actual performance of his or her duty is killed or so injured that he or she dies from the effects thereof, his or her surviving spouse shall be entitled to receive a pension equivalent to one-half (1/2) the salary received by the officer at the time of death, and any service increment the officer may have been entitled to at the time of death. (12580 §1 12/7/83)
>
> In case there is no surviving spouse, or after the death of the surviving spouse, or in case of her or his

remarriage, the pension and service increment shall be paid to the guardian of the deceased officer's dependent children, if any without abatement until the youngest child reaches the age of eighteen (18) years, after which all pension and service increment rights shall cease, with the exception that after the last child has reached the age of eighteen (18) years, then the surviving spouse who has since remarried, at this time will once again have his or her pension rights as a surviving spouse reinstated for the remainder of his or her life.
(12580 §1 12/7/83)..."

Codified Ordinances of City of Allentown
§143.20(A).

Here, as in Levy, infra, this case involves a state-created compensation scheme designed to provide close relatives and dependents of a deceased means of financial support after the provider's death. Petitioner's minor is a dependent of the deceased as set forth above.

2. Respondent City has provided for legitimate children of the decedent but has placed Petitioner's illegitimate minor on inferior footing. Under Respondent's ordinance, the decedent's dependents will

fall within three categories: 1) child of decedent's surviving spouse; 2) child of decedent's ex-spouse; 3) child of decedent born out of wedlock.

Under Respondent's ordinance, children in the first two categories will be provided for:

a) The child of decedent's surviving spouse will be provided for by the surviving spouse.

b) The child of decedent's ex-spouse will be provided for under the laws of equitable distribution in the Commonwealth of Pennsylvania. Pennsylvania law is clear that a spouse has an equitable interest in his/her spouse's pension. Thus, the divorced spouse will/may provide for the decedent's child by way of the divorce settlement including equitable distribution, between the decedent and ex-spouse.

c) The child of decedent born out

of wedlock is relegated to inferior status among decedent's other children. Although the child's parent had provided financial and emotional support, (Appendix p. 28a), Respondent's ordinance terminates that. An illegitimate child has no "surviving spouse" to protect his/her interest. Likewise, an illegitimate child has no ex-spouse of decedent parent to protect his/her right to equitable distribution of natural father's pension. Respondent's ordinance thus invidiously discriminates against illegitimate children by failing to provide any benefits to dependent children solely based upon their illegitimacy.[1]

1.Respondent, City apparently enacted the subject ordinance based upon the outdated notion of the traditional nuclear family. The reality is that the nuclear family envisioned in Defendant's ordinance is a minority in today's society. Plaintiff respectfully requests this Honorable Court to take judicial notice of the breakdown of the traditional nuclear family. Defendant's ordinance invidiously discriminates against Plaintiff's minor based upon the

B. Respondents' denial of equal recovery rights to this dependent illegitimate child violates Petitioner's minor's right to equal protection of laws. Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1968); Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73, 88 S.Ct. 1515 (1968).

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted upon the father. Petitioner, though illegitimate, depended upon the father. Her father cared for her and nurtured her. Petitioner is indeed his in the biological and spiritual sense, and, in his death, Petitioner's minor suffered

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...Continued...

reality of today's "families". Plaintiff respectfully advises this Honorable Court that Plaintiff has engaged an expert in the field of domestic relations (i.e., Professor Barbara Woodhouse of the University of Pennsylvania who may provide expert testimony regarding the disintegration of the nuclear family if this Honorable Court deems necessary testimony.

wrong in the sense that any dependent would. Levy v. Louisiana, supra, 391 U.S. at 72, 88 S.Ct. at 1511.

Petitioner minor's right to be provided for on the death of her natural father must be on equal footing with her father's dependent legitimate children. Weber v. Aetna Cas. & Sur. Co., supra.

III. Respondent, City's discriminatory law is not justified by substantial or important state interest.

Denial of recovery rights to dependent, illegitimate child violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as the inferior classification of this dependent child bears no significant relationship to the recognized purposes of recovery under the ordinance. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 1(1977); Washington v. Davis, 426 U.S.

229 (1976).

Visiting condemnation of irresponsible liaisons beyond bonds of marriage on head of infant is illogical and unjust, and imposing difficulties on illegitimate child is contrary to the basic concept that legal burdens should bear some relation to individual responsibility or wrongdoing. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 92 S.Ct. 1405 (1972).

Respondent's ordinance provides for a decedent's children of surviving spouse via surviving spouse. Respondent's ordinance provides for a decedent's children of an ex-spouse via equitable distribution of marital property including pension plans. Respondent's ordinance fails to provide for illegitimate children of decedent. Respondent's ordinance's placement of illegitimate children on unequal footing cannot be justified by any substantial or important state interest. Arlington Heights, supra;

Washington, supra; Clark v. Jeter, supra. Hence, Petitioner is entitled to judgment as a matter of law.

IV. The court of appeals erred as a matter of law in affirming to grant Respondent's Motion For Summary Judgment. In its opinion, the district court concluded: "No legislative act can be expected to be perfect or to fit every situation". United States District Court Opinion, p. 15, Appendix p. 25-26a. Of course, Petitioner agrees with that statement by the Court. However, Petitioner contends that statement mischaracterizes Petitioner's case against Respondents.

Petitioner argues that in practical effect, Respondent's pension law operates almost invariably to deny benefits to illegitimate children while granting benefits to children who are legitimate. New Jersey Welfare Rights v. Cahill, 411 U.S. 619, 93S.Ct. 1700, 36 L.Ed.2d 543 (1973). As

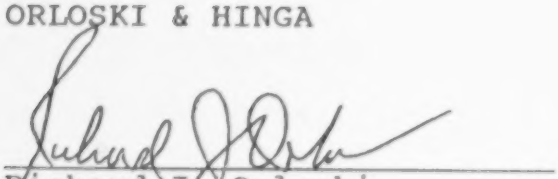
set forth above, children of surviving spouses are provided for by the surviving spouse. Children of divorced parents are provided for the by laws of equitable distribution. Generally, illegitimate children are not provided for. At very least, genuine issue of material fact exist concerning the practical effect of Respondent's Ordinance. [1] Hence, Respondent's motion for summary judgment ought to have been denied. Petitioner's cross-motion for summary judgment ought to have been granted. Petitioner respectfully seeks review by this Honorable Court.

2As set forth above in Footnote 1 above and before the District Court, to the extent this Honorable Court deems necessary, Petitioner respectfully requests the right to supplement this record concerning the practical effect of Respondent's law.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA



Richard J. Orloski,
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1455

CNYTHIA WALTERS, Individually and as parent and natural guardian of MICHAEL DANIELLE WALTERS, a minor,

Appellant

v.

CITY OF ALLENTOWN; JEANNE COSTELLO

Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Civil Docket No. 92-05911
(District Judge:
Honorable Franklin S. Van Antwerpen)

Submitted Under Third Circuit LAR 34.1(a)
October 26, 1993

Before: BECKER, ROTH and LEWIS,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the district court entered April 26, 1993, be and is hereby affirmed. Costs to be taxed against appellant.

BY THE COURT.

Jane R. Roth
Circuit Judge

Attest:

P. Douglas Sisk, Clerk
Dated Oct. 28, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CYNTHIA WALTERS, Individually and as parent and natural guardian of MICHAEL DANIELLE WALTERS, a minor	:	CIVIL ACTION
v.	:	
CITY OF ALLENTOWN and JEANNE COSTELLO	:	NO. 92-5911

OPINION AND ORDER

VAN ANTERWPEN, J. APRIL 22, 1993

INTRODUCTION

This is a declaratory judgment action seeking a declaration of the rights of the plaintiff, Michael Danielle Walters, under a pension plan established by the defendant, City of Allentown. We have before us a Motion For Summary Judgment filed by both defendants on March 10, 1993 and a Cross-Motion for Summary Judgment filed by plaintiff on March 22, 1993.

FACTUAL BACKGROUND

As conceded on page 1 of plaintiff's Brief and on pages 6 and 10 of defendants' Brief, the facts necessary to resolve this

matter are not disputed. In an abundance of caution, whenever possible, we will summarize facts as they are set forth in plaintiff's brief. The plaintiff, Cynthia Walters, is the mother of a minor child named Michael Danielle Walters who was born on January 25, 1988. As acknowledged in a written Paternity Agreement [1] dated October 18, 1988, the father of is child was one Michael Daniel Costello. In 1988, Michael Daniel Costello was a police officer for the City of Allentown. Officer Costello died of a heart attack on March 6, 1992 and is survived by his wife, defendant Jeanne Costello. On or about July 17, 1992, plaintiff requested benefits under the City

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1.A copy of this agreement is attached to defendants' motion as Exhibit "A" to the sworn interrogatories on file. An unsworn copy of this agreement is also attached to plaintiff's motion as Exhibit "C". The brief agreement obligates Michael D. Costello to pay $30 per week support along with medical bills. No express mention is made of any duty pertaining to death or pensions.

of Allentown Police Pension Fund, but was denied the benefits because Officer Costello was survived by a wife who was entitled to the benefits. The denial was based upon Section 143.20 of the Codified Ordinances of the City of Allentown which provides:

> 143.20 BENEFITS FOR SURVIVING SPOUSE OR DEPENDENT CHILDREN
>
> "A. Death in the Line of Duty
> If any police officer while in the actual performance of his or her duty is killed or so injured that he or she dies from the effects thereof, his or her surviving spouse shall be entitled to receive a pension equivalent to one-half (1/2) the salary received by the officer at the time of death, and any service increment the officer may have been entitled to at the time of death. (12580 §1 12/7/83)
>
> In case there is no surviving spouse, or after the death of the surviving spouse, or in case of her or his remarriage, the pension and service increment shall be paid to the guardian of the deceased officer's dependent children, if any without abatement until the youngest child reaches the age of eighteen (18) years, after which all pension and service increment rights shall cease, with the exception that after the last child has reached the age of eighteen (18)

> years, then the surviving spouse who has since remarried, at this time will once again have his or her pension rights as a surviving spouse reinstated for the remainder of his or her life.
> (12580 §1 12/7/83)..."

Allentown, Pa., Code §143.20. Had Officer Costello not been survived by a wife, plaintiff's minor child, Michael Danielle Walters, would have shared in the pension fund regardless of her status as being born out of wedlock. Affidavit of Mayor Daddona, President of the Pension Fund, attached to defendants' Brief.

STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) instructs a court to enter summary judgment when the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law:. This rule provides the court with a useful tool when the critical facts are undisputed, facilitating the resolution of a pending controversy without

the expense and delay of conducting a trial made unnecessary by the absence of factual dispute. Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982); Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert denied, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). Summary judgment is inappropriate, however, where the evidence before the court reveals a genuine factual disagreement requiring submission to a jury. An issue is "genuine" only if the evidence is such that a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 s.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Id. at 249, 106 S.Ct. at 2511. However, if the evidence is

merely "colorable" or is "not significantly probative", summary judgment may be granted. Id.

In a summary judgment action, the moving party bears the initial burden of identifying for the court those portions of the record which it believes demonstrate the absence of a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). This burden may be discharged by demonstrating that there is an absence of evidence to support the non-moving party's case. Id. at 325, 106 S.Ct. at 2554. Following such a showing in a case where the non-moving party is the plaintiffand therefore bears the burden of proff, it must by affidavits or by the depositions and admissions on file "make a showing sufficient to establish the existence of [every] element essential to that party's case." Id. at 322, 106 S.Ct. at 2552;

anderson, 477 U.S. at 256, 106 S.Ct. at 2514; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Fed. R.Civ.P. 56(e). In making its ruling on a summary judgment motion, the court must view all inferences in a light most favorable to the non-moving party, United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962); Continental Ins. Co. v. Bodie, 683 F.2d 436, 438 (3d Cir. 1982), must resolve all doubts against the moving party, Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.), cert denied, 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985), and must take as true all allegations of the non-moving party that conflict with those of the movant, Anderson, 477 U.S. at 255, 106 S.Ct. at 2513.

DISCUSSION

The plaintiff claimsthat the Allentown, Pa., Code §143.20 discriminates

against her in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution,[1] because her daughter Michael Danielle Walters was born out of wedlock. Plaintiff's complaint does not articulate the exact manner in which the pension plan discriminates against her, but in her Brief, she objects to the effect of the Ordinance in directing all benefits to the defendant spouse who has no duty to

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2. **AMENDMENT XIV--**
Section1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. const. amend. XIV, §1.

support the plaintiff's child.[1]

The plaintiff directly cites four cases to support her position. Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), which held that children born out of wedlock could bring an action under a Louisiana statute for the wrongful death of their mother; Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968), which held that a mother in Louisiana could recover for the wrongful death of a child born out of wedlock; Weber v. Aetna Casualty & surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), which

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3. Pennsylvania gives a court the right to attach a municipal pension to provide child support. 23 Pa. C.S.A. §4348(N). Nevertheless, the support law appears to assume the existence of a living person who is obligated to provide support. See for instance, 23 Pa. C.S.A. §4321(2). See also Wolfsohn v. Solms, 392 Pa. 129, 139 A.2d 523 (1958) (duty to support wife ends with death); Homich's Estate, 9 Pa. D&C 327 (Berks County, 1926) (duty to support minor ends with death).

held that a Louisiana workmen's compensation statute that relegated unacknowledged children born out of wedlock to a lesser status was unconstitutional; and Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), which held that a plaintiff had failed to prove that racially discriminatory intent or purpose was a motivating factor in a rezoning decision.

The cases cited by plaintiff form but a small part of the many decisions relating to children born out of wedlock. to help provide historical perspective, we shall examine the cases followingthe first two cases relied upon by plaintiff. Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), dealt with a constitutional challenge to Louisiana statutes that expressly precluded children born out of wedlock from claiming the same intestate rights as other children. The court upheld

the statutes and stated "Levy did not say and cannot fairly be read to say that a state can never treat an illegitimate child differently from legitimate offspring." Id at 536, 91 S.Ct. at 1019. The Court went on to state:

> The social difference between a wife and a concubine is analogous to the difference between a leigitmate and an illegitimate child. One set of relationships is socially sanctioned, legally recognized,and gives rise to various rights and duties. The other set of relationships is illicit and beyond the recognition of the law...[T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this court...

Id at 538, 91 S.Ct. at 1021.

Labine was followed by Weber, the third case cited to support the plaintiff's position. Following weber, the Court decided Gomez v. Perez, 409 U.S. 535, 93

S.Ct. 872, 35 L.Ed.2d 56 (1973), which held that a Texas common law rule which denied support to children born out of wedlock violated the Equal Protection Clause of the U.S. Constitution. That same year the Court invalidated as unconstitutional a New Jersey law limiting assistance payments for the poor to families in which the adults were married. The Court found tht the practical effect of the law operated almost invariably to deny benefits to illegitimate children whil granting benefits to children who are legitimate. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 (1973). The following year the Court decided Jiminez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974) and found unconstitutional a social security[1] provision which

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4. See also Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), aff'd mem., 418 U.S. 901, 94 S.Ct. 3190, 41 L.Ed.2d 1150 (1974);

> of property at death. We long have recognized that this is an area with which the States have an interest of considerable magnitude.

Id. at 268, 99 S.Ct. at 524-25 (citing Trimble, 430 U.S. at 771, 97 S.Ct. at 1466; Weber v. Aetna Casualty & Surety Co., 406 U.S. at 170, 92 S.Ct. at 1404; Labine v. Vincent, 401 U.S. at 538, 91 S.Ct. at 1021).

Two years later in United States v. Clark, 445 U.S. 23, 100 S.Ct. 895, 63 L.Ed.2d 171 (1980), the Court was faced with a federal Civil Service Retirement Act requirement which limited an employee's survivors benefits to children "who lived with the employee." The Court read "lived with" to include situations in which a child had lived with an employee in the past to avoid "a serious constitutional question." Id. at 33, 100 S.Ct. at 903.

In Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) and Pickett v. Brown, 462 U.S. 1, 103 S.Ct.

...Continued...

2199, 76 L.Ed.2d 372 (1983), the Court struck downone and two year statutes of limitations for paternity actions. Following Pickett, in Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910,100 L.Ed.2d 465 (1988), the Court held that Pennsylvania's six year statute[1] of limitations for paternity actions violated the Equal Protection clause. The Court found that unlike other children, children born out of wedlock were denied a sufficient opportunity for the assertion of support claims. The analysis of the Court is particularly instructive in light of the sometimes seesaw results in the decisions which preceded Clark v. Jeter:

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth

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Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.), aff'd mem., 409 U.S. 1069, 93 S.Ct. 689, 34 L.Ed.2d 660 (1972); Davis v. Richardson, 342 F.Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069, 93 S.Ct. 678, 34 L.Ed.2d 659 (1972).

Amendment, U.S. Const., Amdt. 14, §1, we apply differnt levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationaly related to a legitimate governmental purpose. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973); cf. Lyng v. International Union, UAW, 485U.S. 360, 370, 108 S.Ct. 1184, 1192, 99 L.Ed.2d 380 (1988). Classifications based on race or national origin, e.g., Loving v. Virginia, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), and classifications affecting fundamental rights, e.g. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 672 86 S.Ct. 1079, 1084-85, 16 L.Ed.2d 169 (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. See, e.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 723-724 and n. 9, 102 S.Ct. 3331, 3336 and n. 9, 73 L.Ed.2d 19090 (1982); Mills v. Habluetzel, 456 U.S. 91, 99, 102 S.Ct. 1549, 1554-55, 71 L.Ed.2d 770 (1982); Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 456-57, 50 L.Ed.2d 397 (1976); Mathews v. Lucas, 427 U.S. 495, 505-506, 96 S.Ct. 2755, 2762-2763, 49 L.Ed.2d 651 (1976).

To withstand intermediate scrutiny, a statutory classification must be substantially related to an important government objective.

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Clark v. Jeter, 486 U.S. at 461, 108 S.Ct. at 1914.

It is clear that thos who assert a violation of equal protection must prove"the existence of purposeful discrimination." McCleskey v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987); Whitus v. Georgia, 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed.2d 599 (1967); see also Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); Washington v. Davis, 426 U.S. 229, 241, 96 s.sCt. 2040, 2048, 48 L.Ed.2d 597 (1976).

On its face, Allentown, Pa., Code §143.20 does not contain any reference to a child or children born out of wedlock, and only uses the words "dependent children" and "child". These words become relevant only if there is no surviving spouse in which case defendants concede plaintiff's

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child would be entitled to benefits just as in the case of any other child. Accordingly, we are not dealing with an express provision of an ordinance classifying children[1] but rather, we are dealing solely with the **effect** of an otherwise neutral ordinance. there is, in fact, no direct evidence of purposeful discrimination in this case. Indeed, the sparse evidence before us is to the contrary. See Affidavit of Mayor Daddona, President of the PensionFund, attached to defendants' Brief (If Officer Costello was not survived by his spouse, plaintiff's minor child would have shared in the pension fund regardless of the child's illegitimacy).

Furthermore, Pennylvania considers all children to be legitimate regardless of the

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6.. The old six year statute of limitations was replaced in 1985 by an 18 year statute of limitations which was sought and drafted by this Judge when he was serving on the State Court of Common Pleas. 23 Pa. C.S.A.

marital status of their parents. 23 Pa. C.S.A. §5102(a). Purposeful discrimination would be inconsistent with this legislation. From a practical standpoint, we can perceive nothing unique about Allentown, Pa., Code §143.20. It undoubtedly mirrors countless retirement plans throughout the United States, and setting aside this Ordinance might well undermine the actuarial foundations of this and similar plans.

The purpose of allentown, Pa., Code §143.20 is to provide funds to support the spouses of deceased police officers. The plaintiff hasneither submitted any sworn affidavits, nor pointed to anyother appropriate evidence under Fed. R.Civ.P. 56 that would suggest the ordinance was enacted for a discriminatory purpose, rather than this important governmental objective.

We turn to the last case cited by

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plaintiff's counsel, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), where the Court dealt with an ordinance which allegedly had the **effect** of causing racial discrimination. The Court articulated areas of inquiry which, along with disproportionate impact, might show an intent or purpose to discriminate: a clear pattern of impact unexplainable on grounds other than race; the historical background and events which led to the ordinance or action; departures from normal procedural sequences; departures from usual substantive factors; and the legislative history. Id.at 266-26, 97 S.Ct. at 564-565. Arlington Heights concerned racial discrimination which required strict scrutiny. In the instant case, intermediate scrutiny is the appropriate legal test, nevertheless, when applied to the present matter, the plaintiff has

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failed to establish that any of the areas of inquiry specified in arlington Heights show an intent or purpose to discriminate.

a moving party may discharge his burden in a summary judgment motion by demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex corp. v. Catrett, 477 U.S. 317, 325, 106 S.sCt. 2548, 2554, 91 L.Ed.2d 265 (1986). Here, in response to the defendants' showing, the plaintiff has offered no statistical evidence of any type, much less of any pattern or practice. The result in this matter is easily explainable on grounds of a statutory purpose of helping spouses of deceased police officers. There, likewise, is no evidence of the history, legislative or otherwise, which led to the enactment of Allentown, Pa., Code §143.20 and we have no reason to believe that the motives behind it were improper. The historical events

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immediately preceding plaintiff's suit are straightforward and unremarkable. The correspondence and actions are polite and untouched by substantive or procedural departures. This case is readily distinguishable from New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 (1973), where "in practical effect it [the law in question] operated almost invariably to deny benefits to illegitimate children." Id. We believe that while there will undoubtedly be situations like the instant case that arise from time to time, they will not be frequent.

Without question, police work can be dangerous. Nevertheless, it seems fair to assume that more older police officers than younger ones will die, and that when they do they will be less likely to have minor children to support. When children do survive an officer, it would also seem fair

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to assume that those charged with upholding the law willnot have more children born out of wedlock than those who are not so charged.[1]

Of far more consequence is the divorce rate produced by the stresses of police work.[2] In such commonplace situations, the ordinance has the equal effect of denying

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§4343(b).

7. Nor is there any evidence to suggest that the ordinance was applied in a different manner to different classes of people.

8. Approximately one out of every four U.S. births is to an unmarried woman. See for instance Times Books, N.Y., The Economist book of Vital World Statistics 224 (1990).

9. It is widely accepted that approximately 50% of all U.S. marriages end in divorce. The divorce rate is half the marriage rate. See Times Books,N.Y., the Economist Book of Vital World Statistics 224 (1990). Although no individual data base is known to exist, Law Enforcement Psychological Services, Inc. of San Jose, California, estimates the divorce rate for police officers at approximately 75%, as do others in the profession. See direct quotes: Avis Thomas-Lester, Officers Find Love is Blue; Across Area, More Police Marrying Police, Washington Post, May 28,

benefits to divorced spouses even though they have children who were born in wedlock. To be sure, this may be remedied by a property settlement agreement or equitable share of a divorce settlement, but this is not a certain result.[1] A putative father can acknowledge paternity and if he refuses, a court can determine parentage. This would give a child born out of wedlock all the rights of any other child. [2] A father is also free to make voluntary provisions for a child born out of wedlock upon his demise. All these variables point more to an infrequent occurrence of the present situation rather than to an invariable occurrence. They also point to a burden imposed by the Ordinance on some children who are not born out of

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1991, §1, at A1; see also Wendy Benedetto, Cops Cope with Bad Rap, USA Today, August 6, 1991, §News, at 9A; Linda Matchan, Fighting the Police Taboo of Stress, Boston Globe, October 10, 1991, §Metro/Region, at 16.

wedlock.

A policeman's lot is often not a happy one. They are far from the highest paid members of society and the money available to fund pension plans is not without limits. In the absence of any proper evidence of discriminatory intent ot purpose, we will not quibble with the difficult choices made by those who represent police officers and those who are elected to supervise them. No legislative act can be expected to be perfect or fit every situation.

An appropriate order follows.

...Continued...

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CYNTHIA WALTERS, Individually and as parent and natural guardian of MICHAEL DANIELLE WALTERS, a minor	:	CIVIL ACTION
v.	:	
CITY OF ALLENTOWN and JEANNE COSTELLO	:	NO. 92-5911

ORDER

AND NOW, this 22nd day of april, 1993, defendants' Motion for Summary Judgment filed March 10, 1993 is **GRANTED** and plaintiff's Cross-Motion For Summary Judgment filed March 22, 1993 is **DENIED.** In so doing we necessarily determine that, in its present application, Ordinance 143.20 of the city of Allentown, Pennsylvania isnot unconstitutional or in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. **JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS** and **AGAINST PLAINTIFF.** This case is **CLOSED.**

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IT IS ACKNOWLEDGED that the Defendant has already paid the sum of four Hundred Twenty Dollars and 00/100 ($420.00) to the said Prosecutrix on account of this Agreement, receipt whereof she does hereby acknowledge and both parties therefore agree that the first payment under this Agreement is due no later than the 17th of October, 1988, and shall be paid bi-weekly thereafter.

IT IS FURTHER AGREED that the Defendant shall be responsible for payment of any unusual medicals that are not covered by medical insurance available to Cynthia Walters, either through her own employment or that of her husband, Michael Walters, it being further acknowledged that at the time of the birth of the said child the Prosecutrix was married and is still married to Michael Walters at the time of the execution of this Agreement. It is further understood should there be no

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medical coverage available for the child then the Defendant will be primarily responsible for the payment of medical bills until the saidchild becomes eighteen (18) years of age or emancipated.

CUSTODY shall remain with the Prosecutrix.

SHOULD THE DEFENDANT miss four (4) payments then it is the understanding of the parties that thismatter will be adjudicated in the appropriate Domestic Relations Court inand for Lehigh County, Pennsylvania.

ACKNOWLEDGEMENT

TO WHOM IT MAY CONCERN:

I, the undersigned, do hereby acknowledge that I am the natural father of Michael DanielleWalters, a female child, born January 25, 1988, to one, Cynthia Walters.

Michael D. Costello

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10. Pennsylvania provides for equitable distribution of marital property in an action for divorce. 23 Pa. C.S.A. §3502.

11. See 23 Pa. C.S.A. §5103(a) and 20 Pa. C.S.A. §2107(c).

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of life, liberty, or property, without due process of law, nor deny to any peson within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
FEB 22 1994
OFFICE OF THE CLERK

No. 93-1192

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WALTERS, Individually and as parent and natural guardian of MICHAEL DANIELLE WALTERS, a minor,

Petitioner,

versus

CITY OF ALLENTOWN and JEANNE COSTELLO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT ON PETITIONER'S CLAIM FOR PENSION FUND BENEFITS WHERE RESPONDENT'S PENSION PLAN PROVIDES THE CHILDREN OF THE DECEASED, WHETHER LEGITIMATE OR ILLEGITIMATE, EQUAL PENSION BENEFITS.

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STATEMENT OF CASE

As conceded by both parties, the facts necessary to resolve this matter are not disputed. The Petitioner, Cynthia Walters, is the mother of a minor child named Michael Danielle Walters who was born on January 25, 1988. As acknowledged in a written Paternity Agreement dated October 18, 1988, the father of this child was one Michael Daniel Costello. (Paternity Agreement, attached to Petitioner's brief.) In 1988, Michael Daniel Costello was a police officer for the City of Allentown. Officer Costello died of a heart attack on March 6, 1992 and was survived by his wife, Respondent Jeanne Costello. On or about July 17, 1992, Petitioner requested benefits under the City of Allentown Police Pension Fund, but was denied the benefits because Officer Costello was survived by a wife who was entitled to the benefits. The denial was based upon Section 143.20 of the Codified Ordinances of the City of Allentown which provides:

> 143.20 BENEFITS FOR SURVIVING SPOUSE OR DEPENDENT CHILDREN
>
> "A. Death in the Line of Duty if any police officer while in the actual performance of his or her duty is killed or so injured that he or she dies from the effects thereof, his or her surviving spouse shall be entitled to receive a pension equivalent to one-half (1/2) the salary received by the officer at the time of death, and any service increment the officer may have been entitled to at the time of death. (12580 § 1 12/7/83)
>
> In case there is no surviving spouse, or after the death of the surviving spouse, or in case of her

> or his remarriage, the pension and service increment shall be paid to the guardian of the deceased officer's dependent children, if any without abatement until the youngest child reaches the age of eighteen (18) years, after which all pension and service increment rights shall cease, with the exception that after the last child has reached the age of eighteen (18) years, then the surviving spouse who has since remarried, at this time will once again have his or her pension rights as a surviving spouse reinstated for the remainder of his or her life. (12580 § 1 12/7/83) . . . "

Allentown, Pa., Code § 143.20. Had Officer Costello not been survived by a wife, Petitioner's minor child, Michael Danielle Walters, would have shared in the pension fund regardless of her status as being born out of wedlock.

Upon these facts, the Court of Appeals affirmed the District Court's grant of Respondents' Motion of Summary Judgment.

ARGUMENT

I. There are no disputed facts that would preclude summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to Material Fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). When deciding a motion for summary

judgment, the court must view all facts and the reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. See *Continental Insurance Co. v. Bodie,* 682 F.2d 436, 438 (3d Cir. 1982). Petitioners have, however, failed to state with any clarity that dispute exists as to any facts.

To prove that no genuine factual issues exist, a movant must present a factual scenario without any "unexplained gaps". *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

Each of the facts set forward as necessary to the resolution of the Respondents' motion for summary judgment was acknowledged by all of the parties in either pleadings or discovery. Indeed, a factual scenario without any unexplained gaps was presented as required in *Adickes v. S.H. Kress & Co., supra.* Judge Van Antwerpen observed on page one of his opinion "As conceded on page 1 of Petitioner's Brief and on pages 6 and 10 of Respondents' Brief, the facts necessary to resolve this matter are not disputed." (Judge Van Antwerpen's opinion, attached to Petitioner's brief.)

There can be no question that the Decedent, a City policeman entitled to pension benefits, died leaving a widow (Respondent Jeanne Costello) and an acknowledged illegitimate daughter (Petitioner's minor child). Both of these parties applied for pension benefits after his death and pursuant to the provisions of the pension ordinance, Respondent Jeanne Costello received benefits as the surviving spouse. Petitioners Walters attempted to bring this suit based on an allegation that the rejection of her application for benefits was based upon the child's

status as illegitimate, but admittedly has no evidence to indicate that this is true.

The case before this Court is almost a textbook example in which it is not the facts, but a legal question concerning the pension plan ordinance which presents the issues for resolution. It is in precisely such a case that a motion for summary judgment can avoid an unnecessary trial and simplify and streamline the process of adjudication.

II. The city pension plan, which provides that a child of the deceased is entitled to benefits if there is no surviving spouse, does not deny to an illegitimate child equal protection of the law.

A. Petitioner's brief fails to discuss the conflict among circuits on which it relies for review and therefore certiorari should be denied.

Petitioner's stated reason for seeking review by this Court rests upon an assertion that there exists among the circuits a conflict of opinion on the issue raised by Petitioner. Upon examination of Petitioner's Brief, it is evident that Petitioner has offered only a bald and conclusory assertion of conflict completely unsupported by argument or discussion. Petitioner fails to compare and contrast circuit court decisions since to do so would clearly support Respondent's position. For this reason, certiorari should be denied.

The Fourteenth Amendment of the U.S. Constitution provides in part, "No state shall deny to any person within its jurisdiction the equal protection of the laws". Although equality in the application of laws would

appear to be a simple matter, judicial review of equal protection cases has created a myriad of standards, tests and rules. It is clear, however, that being treated equally is the best that the equal protection clause can offer; it does not secure substantive rights other than those provided generally.

In equal protection analysis, illegitimacy as a classification is considered to be of quasi-suspect status, which requires a substantial relationship to a legitimate state interest in order to be sustained. *Clark v. Jeter,* 108 S.Ct. 1910 (1988). (This is a lesser standard of scrutiny than that accorded to classifications based on race, national origin or religion.) Under this standard, a classification based on illegitimacy must actually serve an important governmental interest and not simply arguably serve some rational basis.

Having set forth this general statement of the law on this topic, however, it must be pointed out that no such classification appears on the face of the pension ordinance. The concept of legitimacy is not mentioned anywhere in its provisions. As Judge Van Antwerpen pointed out in his opinion:

> On its face, Allentown, Pa., Code § 143.20 does not contain any reference to a child or children born out of wedlock, and only uses the words "dependent children" and "child". These words become relevant only if there is no surviving spouse in which case Respondents concede Petitioner's child would be entitled to benefits just as in the case of any other child. Accordingly, we are not dealing with an express provision of an ordinance classifying children but rather we are dealing solely with the *effect* of

> an otherwise neutral ordinance. There is, in fact, no direct evidence of purposeful discrimination in this case. Indeed, the sparse evidence before us is to the contrary. See Affidavit of Mayor Daddona, President of the Pension Fund, attached to Respondents' Brief (If Officer Costello was not survived by his spouse, Petitioner's minor child would have shared in the pension fund regardless of the child's illegitimacy.). (Judge Van Antwerpen's opinion, attached to Petitioner's brief.)

At best, Petitioner Walters' claim must be based on some perceived effect of the operation of the provisions of the ordinance. Although Petitioner Walters' pleadings do not articulate the manner in which they believe the pension plan discriminates against the minor child, presumably their contention is that because she is illegitimate, she wrongfully loses the support of her father upon his death. In fact, a reading of the ordinance provision shows that legitimacy has no bearing whatever on the receipt of benefits by a child. Petitioner's daughter was not excluded from receiving benefits because of illegitimacy. In order to receive benefits, a child has to be dependent, be a minor, and there must be no surviving spouse. In this case, it is only the existence of Jeanne Costello, the surviving spouse, which prevents Petitioner's minor child from being eligible for benefits, not her status as illegitimate.

Since the actions of the Respondents which resulted in Petitioner's failure to receive benefits for the child were not based on illegitimacy, but the provisions of the ordinance and the ordinance itself is neutral on its face, containing no reference, however oblique, to illegitimacy,

Petitioners may be relying on the effect of the ordinance to support the claim.

Although Petitioners may assume that any legislation that carries the effect of discrimination violates the equal protection clause, the Supreme Court has stated otherwise in *Washington v. Davis,* 426 U.S. 229 (1976). In this case the Court ruled that intent was the standard; a standard which requires purposefulness rather than merely a disproportionate impact upon a certain group. Where discrimination is not clear on the face of a statute, rule or, in this case, ordinance, it is necessary for Petitioners to establish intent. In *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977) the Court cited five types of evidence that, added with disparate impact, might show intent: extreme disproportionate impact, the absence of justification, historical background of the action, departure from normal procedural standards and departures from typically applied substantive rules. The Petitioners have supplied no evidence that would suggest that the ordinance was enacted for a discriminatory purpose, rather than the important governmental objective of providing support for the spouses of deceased police officers.

Perhaps Petitioners contend that, if the daughter were legitimate, then the child's mother would receive the benefits, as surviving spouse, and the child would, in effect, be provided for. However, this argument, should it be advanced by Petitioners, is not persuasive, because the very same consequences experienced by this minor child would occur to a legitimate, minor and dependent child whose parents have divorced and remarried. This result occurs to any child whose parent is not currently married

to the vested City employee at the time of death. Although it is rare for a retired or deceased member of this pension plan to have any minor children at this stage in life, this effect is much more likely to occur because of a divorce than because of illegitimacy. Judge van Antwerpen included a brief overview of sociological research supporting these points. He said:

> Without question, police work can be dangerous. Nevertheless, it seems fair to assume that more older police officers than younger ones will die, and that when they do they will be less likely to have minor children to support. When children do survive an officer, it would also seem fair to assume that those charged with upholding the law will not have more children born out of wedlock than those who are not so charged.
>
> Of far more consequence is the divorce rate produced by the stresses of police work. In such commonplace situations, the ordinance has the equal effect of denying benefits to divorced spouses even though they have children who were born in wedlock. To be sure, this may be remedied by a property settlement agreement or equitable share of a divorce settlement, but this is not a certain result. A putative father can acknowledge paternity and if he refuses, a court can determine parentage. This would give a child born out of wedlock all the rights of any other child. A father is also free to make voluntary provisions for a child born out of wedlock upon his demise. All these variables point more to an infrequent occurrence. They also point to a burden imposed by the Ordinance on some children who are not born out of wedlock. (footnotes omitted) (Judge Van Antwerpen's opinion, attached to Petitioner's brief.)

The Petitioners offered no evidence of any discriminatory practice or pattern. For these reasons, Petitioners have failed to show any disproportionate impact whatever.

Legitimacy is simply not an issue in these circumstances. If Mr. Costello had been unmarried at the time of his death, his daughter would have received benefits without regard to her status. If there is any unfairness in the provisions of the pension ordinance, it is an unfairness to any minor dependent child of a pensioner who does not live in the household of the surviving spouse. Such a result does not involve a protected class and does not rise to the level of a deprivation of equal protection. Petitioner has failed to support the existence of a cause of action against Respondents and the order of the lower court should be affirmed.

In this case Petitioners have failed to raise any inference of intent that would be necessary to prove a cause of action against the Respondents. Petitioners have failed to even allege that the ordinance has any disproportionate impact upon illegitimate children which would give rise to a cause of action for violation of equal protection. Further, Petitioners have failed to allege the existence of any of the types of evidence cited in *Arlington Heights v. Metropolitan Housing Development Corporation*, supra, which would support an allegation of intent to discriminate. Petitioners have failed to support the existence of a cause of action against Respondents and the Complaint should be dismissed.

Even assuming arguendo that the Petitioner had a cause of action against the Respondent, it would still be an insufficient reason for certiorari since the Petitioner's argument presents no new and important federal question

for this Court. Indeed, the importance of the Petitioner's argument can be measured by the fact that Petitioner herself failed to rely upon this basis as a reason for warranting review and by the fact that the Third Circuit Court of Appeals summarily affirmed the District Court's Opinion. Based upon the non-existence of a new and important federal question, certiorari should be denied.

CONCLUSION

For the foregoing reasons, Petitioner has failed to state a cause of action for violation of the right to equal protection of the law on behalf of Petitioner's minor. There is no genuine issue of material fact and Petitioner has shown nothing in the actions of the Respondents or in the effect of the pension ordinance to indicate that there is any liability on the part of Respondents. The petition for certiorari should be denied.

Respectfully submitted,

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